IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 915 81

TEXACO INC., a Delaware Corporation, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, *Respondents*,

and

CITIES SERVICE GAS COMPANY, a Delaware corporation, *Intervening Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Delaware in its Civil Action No. 69, 1959.

OPINIONS BELOW

The opinion of the Superior Court of Delaware in and for New Castle County in Civil Actions Nos. 670, 671 and 708 (1958) (Appendix A, pp. 1a-15a) is reported at 155 A. 2d 879. The opinion of the Supreme

Court of Delaware is reported at 158 A. 2d 478 (Appendix B, pp. 16a-30a).

JURISDICTION

The judgment of the Supreme Court of Delaware was entered on March 18, 1960 (Appendix C, pp. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The issue of petitioner's rights and immunities under the Natural Gas Act was raised in its Answer (Appendix B, p. 20a) its Motion for Summary Judgment in the Superior Court (Appendix D, pp. 35a-36a) and in its Petition for Writ of Prohibition in the Supreme Court of Delaware (Appendix E, pp. 37a-44a).

QUESTIONS PRESENTED

1. Whether, in the light of Section 22 of the Natural Gas Act, a state court has jurisdiction to entertain and decide a common law action to recover monies paid in compliance with a rate filed with and accepted and made effective by the Federal Power Commission for sales of natural gas subject to the Act?

2. Whether, in the light of Section 19 of the Natural Gas Act, a state court has jurisdiction to entertain and decide a common law action which collaterally attacks orders of the Federal Power Commission reviewable under Section 19 but for which no review was sought?

3. Whether a state court, in a common law action in which the legality of a filed rate of a natural-gas company under the Natural Gas Act is material to its decision, has jurisdiction to determine that such filed rate is different from the filed rate accepted and

made effective by formal action of the Federal Power Commission?

STATUTES AND REGULATIONS INVOLVED

The provisions of the federal statute involved are Sections 4, 5, 7, 16, 19 and 22 of the Natural Gas Act, 52 Stat. 822, 823, 825, 830, 831 and 833 (1938), 15 U.S.C. 717, 717c, 717d, 717f, 717o, 717r and 717u (Appendix F, pp. 45a-55a). Sections 154.92 through 154.94, and 157.23 of the Federal Power Commission's Regulations under the Natural Gas Act (18 C.F.R. 154.92-154.94 and 157.23), are also involved, having the force and effect of statutes (Appendix G, pp. 56a-60a).

STATEMENT

Responsive to the Rules and Regulations applicable to independent producers of natural gas, which were issued by the Federal Power Commission to implement the decision of this Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), petitioner, an independent producer as defined in those regulations, on September 24, 1954, tendered to the Commission for filing the rate of 11¢ per Mcf at 14.65 pounds per square inch absolute as its rate under the Natural Gas Act for the sales of natural gas here involved to intervening respondent, Cities Service Gas Company (Cities). In connection therewith, petitioner filed its gas sales contract and billing statement with tables showing that on June 7, 1954, petitioner was being paid at the 11¢ rate for such sales in accordance with a minimum price order issued by the Kansas Corporation Commission requiring the payment of such price for this gas after January 1, 1954. (Appendix B, p. 19a). On December 29, 1955, the Commission duly convened and voted to accept, and thus make

effective as petitioner's filed rate under the Natural Gas Act, the 11¢ rate so tendered. (The Commission's minutes showing this action are set forth in Appendix II, pp. 65a-69a). By letter order dated February 7, 1955, the Commission officially notified petitioner of this formal action and its acceptance of this rate (Appendix I, pp. 76a-80a).

Also, pursuant to the said regulations and Section 7 of the Act, on November 24, 1954, petitioner filed with the Commission its application for a certificate of public convenience and necessity for authority to engage in such sales which certificate was issued by order dated December 5, 1955, and accepted by petitioner by letter dated December 16, 1955. Though Cities was notified of such proceedings pursuant to the Act and the Commission's regulations, it did not challenge this order, nor was any objection taken to the Commission's action of February 7, 1955, making effective the 11¢ rate.

Subsequently, petitioner filed a change in rate giving the statutory notice required by Section 4 of the Act, that, effective July 1, 1957, its rate for these sales would be increased *from 11¢* per Mcf at 14.65 p.s.i.a. to 11.055¢ per Mcf at the same pressure base. (This increase reflected Cities' agreement in the sales contract to reimburse petitioner for 50 per cent of any increased production taxes. A one per cent state severance tax became effective July 1, 1957.) By letter order dated September 8, 1957, the Commission, effective as of July 1, 1957, accepted the increased rate filing, as petitioner's Supplement No. 5, (Appendix I, pp. 80a-82a), and made effective petitioner's new 11.055¢ rate. Again, Cities, although it had statutory notice, did not challenge this order of the Commission.

Cities paid petitioner at the 11¢ rate from January 1, 1954 through June 30, 1957, and at the 11.055¢ rate from July 1, 1957 through December 22, 1957. However, upon invalidation of the above mentioned Kansas 11¢ minimum price order by this Court on January 20, 1958, in *Cities Service Gas Co. v. Kansas Corporation Commission*, 355 U.S. 391, Cities sued petitioner upon a common law action in a Superior Court in Delaware to recover the difference between the amounts it had paid at the 11¢ and the 11.055¢ rates and the lower prices set out in the gas sales contract.[1]

Cities' suit made no mention of the fact that the gas sales were subject to the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act, that petitioner's rate had been filed by the Commission or that petitioner had been issued a certificate of public convenience and necessity authorizing such sales. It bottomed its action on a so-called "refund letter" dated January 21, 1954, in which Cities advised petitioner that it would pay the price of 11¢ per Mcf, but was doing so involuntarily and under compulsion, and that should the Kansas order be held to be invalid it would expect to be refunded the amounts it had paid in excess of amounts which would have accrued under the original contracts. (Appendix B, p. 18a). Cities further alleged that the provisions of this letter were referred to on all of the checks by which Cities paid petitioner. Petitioner did

[1] Actually suit was brought on three sales contracts which were designated The Texas Company's FPC Rate Schedules Nos. 100, 68 and 69. (Petitioner changed its name, effective May 1, 1959, from The Texas Company to Texaco Inc.) Since Rate Schedule No. 100 accounts for almost $400,000 of the $412,955.95 for which recovery is sought, in the interest of simplicity, petitioner's statement has been confined to the facts with respect to that particular contract.

not reply to Cities' letter of January 21, 1954, but did endorse and cash the checks. Cities sought recovery in the state court on the theory that the letter, the reference thereto on the checks, and the acceptance of the checks constituted a "contract" to make refund. Other common law bases for recovery were set forth in the petition, but the contract theory was accepted by the Supreme Court of Delaware.

Petitioner defended by setting out the provisions of the Natural Gas Act requiring the filing of rates of natural gas companies; the Commission order accepting the 11¢ rate; the Commission order issuing to petitioner a certificate of public convenience and necessity covering these sales; and the Commission order accepting the subsequent increase from a rate of 11¢ to the rate of 11.055¢. Petitioner also showed that, in addition to the original contract and the Kansas 11¢ minimum price order, the "refund letter" was filed with the Commission as a part of petitioner's rate schedule. Thus, the record shows that when the increase in rate from 11¢ to 11.055¢ was accepted and made effective as late as September 8, 1957, the Commission continued in its original determination that, after considering all the documents on file as petitioner's rates schedule, a rate of at least 11¢ was petitioner's legally effective rate for these sales on and after June 7, 1954.

Petitioner then showed that Cities had raised no objection to any of these three reviewable orders of the Commission, nor did it apply for rehearing upon or petition for review of any of them under Section 19 of the Act.

Petitioner moved for summary judgment on the ground that the state court was without jurisdiction.

When the Superior Court overruled this motion, petitioner, together with the defendants in consolidated companion cases,[2] filed in the Supreme Court of Delaware a petition for a writ of prohibition, seeking to prohibit the Superior Court from proceeding further with these actions. Cities, plaintiff in the cases below, intervened as a respondent and the court stayed further proceeding below.

The Delaware Supreme Court found that the state court had jurisdiction and denied the writ of prohibition. In reaching its conclusion it held, first, that claims for refunds of monies paid in compliance with petitioner's filed rate are not founded upon any liability or duty created by the Natural Gas Act so that Section 22 of the Act is inapplicable, second, that review of the Commission's orders under Section 19 is required only when the reasonableness of the filed rate is being attacked in a federal court so that Cities failure to challenge the Commission's orders did not preclude its suit, and third, that until the Commission has determined the justness and reasonableness of a rate pursuant to its review powers under the Act, a state court has the power to determine, as did the lower court, that a filed rate is different than the rate accepted by the Commission as the effective filed rate. To make such findings, the Court found it necessary to interpret key decisions of this Court construing the Natural Gas Act and other applicable decisions.

The Supreme Court of Delaware entered its final judgment March 18, 1960 but stayed further proceed-

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[2] These consolidated cases were: *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, Civil Action Nos. 670 and 708, 1958, *Cities Service Gas Co.* v. *Pan American Petroleum Corporation*, Civil Action No. 722, 1958, and *Cities Service Gas Co.* v. *The Texas Company*, Civil Action No. 671.

ings pending action by this Court on this petition for writ of certiorari. (Appendix C, p. 31a). In its notice of such stay the Supreme Court of Delaware said,

> "All the members of the Court are of the opinion that the application for a stay should be granted, for the reason that the case seems to us to be an appropriate one for the granting of the writ [of certiorari]—" (Appendix C, p. 33a).

REASONS FOR GRANTING WRIT

The effect of the decision of the Delaware Supreme Court, if allowed to stand, will be to undermine uniformity of enforcement by the Federal Judiciary of liabilities and duties created by the Natural Gas Act, abrogate important regulatory authority of the Federal Power Commission, and disrupt the orderly administration of the Act

- by opening to collateral attacks, in the courts of the 50 states, past and future orders of the Federal Power Commission regulating some 8,000 natural-gas companies, contrary to the express provisions of the Natural Gas Act,
- by overturning the finality of uncontested filed rates of natural-gas companies contrary to this Court's holding in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951),
- by enervating Section 19 of the Act, contrary to this Court's decision in *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958),
- by finding that regulation by the Federal Power Commission under the Natural Gas Act begins

only with its review of rates under Sections 4(e) and 5(a) of the Act, contrary to this Court's pronouncements in *Atlantic Refining Co.* v. *New York Public Service Commission*, 360 U.S. 378 (1959),

by holding that private rate agreements with respect to rates of regulated natural gas sales become effective and are enforceable absent prior Commission action, contrary to the proper construction of this Court's opinion in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

In addition to preventing such consequences, an opinion of this Court will resolve the controversial issues in numerous similar suits, involving millions of dollars, now pending in various state and federal courts. (See Appendix J, pp. 83a-85a, for list of these cases).

1. Incompatibility With the Filed Rate Doctrine Expressed in the Montana-Dakota Case

The court below distinguished between the legal effect of rates *filed with* and rates *reviewed by* the Commission, holding that, while it did not have the power to change a rate which had been found to be reasonable by the Commission, it did have the power to change a rate which was only filed with, voted upon, and accepted by the Commission. (Appendix B, p. 28a). The Delaware Supreme Court so held despite this Court's majority statement in *Montana-Dakota* that:

"It [the buyer] can claim no rate as a legal right that is other than the filed rate, whether fixed, or merely accepted by the Commission, and not

> even a court can authorize commerce in the commodity on other terms." (341 U.S. at 251).

and the minority statement that:

> "Unless they [the filed rates] are challenged either by an interested party or on the Commission's initiative, the filed rates become the legal rates." (341 U.S. at 255).

2. Incompatibility With the Mobile and Atlantic Refining Co. Cases

Despite the fact that Cities' "refund letter" was filed and accepted by the Commission as a part of petitioner's rate schedule under the Natural Gas Act, the Delaware Court held that Cities' suit for enforcement of this "contract" was not an action to enforce a liability or a duty created by the Act or any rule, regulation or order thereunder and therefore the state court was not excluded from jurisdiction by Section 22 of the Act. To enable it to make this holding, the Delaware Court interpreted this Court's decision in the *Mobile* case (350 U.S. 332) to mean that there is no regulation of natural-gas companies by the Federal Power Commission until the Commission exercises its review powers under either Sections 4 or 5 of the Act. (Appendix B, pp. 24a-25a).

Petitioner believes this interpretation to be incompatible with *Mobile* and contrary to the concept of the Commission's regulatory functions with respect to initial rates as expressed in the *Atlantic Refining Co.* case. (360 U.S. at 391). Regardless of what the parties may agree, they cannot engage in the sales of natural gas until a rate therefore has been filed with and accepted by the Commission—until a rate has been established as required by the Act. Nor do changes

in rates automatically become effective by agreement of the parties as the state court seems to believe. They must also be filed in accordance with the provisions of the statute and the Commission's regulations. In either case, the Commission must exercise important regulatory functions before rates become effective and enforceable. Therefore, the rates derive their only force and effect from the Natural Gas Act so that rights with respect to rates, whether it be a producer's right to collect his effective filed rate or a pipeline's right to recover for alleged overpayments, are rights "created" by the Act within the meaning of Section 22.

The effect of the state court's holding—that federal courts do not have exclusive jurisdiction of suits involving disputes over rates established by the Natural Gas Act because such rights are not "created" by the Act—will be to destroy uniformity of enforcement of the Act, contrary to the obvious purpose of Section 22 thereof.

Moreover, no sales of natural gas can be made until authorized by the Commission through the issuance of a certificate of public convenience and necessity under Section 7 of the Act, such as the one issued to petitioner in this case. In the *Atlantic Refining Co.* case, 360 U.S. at page 391, this Court said that Section 7 "requires a most careful scrutiny and responsible reaction [by the Commission] to initial price proposals of producers" and "requires the Commission to evaluate all factors bearing on the public interest." Such determinations require the exercise of the special expertise of the Federal Power Commission before it makes effective a filed rate. Therefore, the state court's substitution of its version of the proper rate for the rate authorized and made effective by the

Commission is tantamount to a holding that a state court can substitute its *opinion* of whether or not a rate is in the public interest, for the determination of the Commission that it is after the Commission has exercised its special knowledge. This results in abrogating regulatory powers of the Federal Power Commission vital to its proper administration of the Act.

3. Incompatibility With the Tacoma v. Taxpayers of Tacoma Case

Even assuming that the state court was right in holding that the 11¢ rate accepted by the Commission was the incorrect rate, the jurisdiction assumed and the action taken by that court is in direct conflict with this Court's holding in the *Tacoma* case. (357 U.S. 320).

Cities failed to exhaust its administrative remedies by timely challenging the orders of the Commission determining petitioner's filed rate to be the 11¢ rate as it could have done under Section 19(a) of the Act and by seeking review under Section 19(b) as it had done in a similar minimum price order controversy in *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958). In that case and in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1957) the courts held that the action of the Commission in accepting an independent producer's rate for filing sufficiently aggrieved the purchasing pipelines to allow them to seek review under Section 19(b).

From this Court's statements in the *Tacoma* case, it seems clear to petitioner that Cities' *exclusive* mode of seeking relief from the Commission's orders with respect to petitioner's filed rates was a direct attack

thereon via the procedure prescribed and available under Section 19. In discussing Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b), which is identical in all respects with Section 19(b) of the Natural Gas Act, this Court said in the *Tacoma* case at page 336 that that section "prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders" and that all objections to the Commission's action "must be made in the Court of Appeals or not at all."

Although petitioner challenged the state court's jurisdiction on the grounds that Cities had failed to follow this exclusive Section 19 review procedure, the Supreme Court of Delaware held that the exhaustion of administrative remedies would only "be applicable to a suit in the federal court attacking the reasonableness of the rate." (Appendix B, p. 29a). While it added that in this case "no attack is made upon the 'filed rate' which the federal courts have held to be the gas contract rate," such statement ignores the effect of its decision which sets aside, and therefore constitutes a collateral attack upon, the orders of the Commission accepting 11c as the filed rate. Thus the state court's decision is in direct conflict with *Tacoma*.

Furthermore, as this Court pointed out at pages 336 and 337 of its *Tacoma* decision, it was the intent of Congress that the Commission's orders have finality. This Congressional intent would be thwarted if, as the Delaware Supreme Court has held, Commission orders reviewable under Section 19 of the Act remain subject to collateral attack in state courts for years after they have gone unchallenged.

CONCLUSION

For the reasons hereinabove set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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